

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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GUNTER HEIDIG and JANIS HEIDIG,

Plaintiff,

v.

PNC BANK, N.A. C/O TRUSTEE  
CORPS; SOMA FINANCIAL; FEDERAL  
HOME LOAN MORTGAGE  
CORPORATION AS TRUSTEE FOR  
SECURITIZED TRUST FREDDIE MAC  
MULTICLASS CERTIFICATES, SERIES  
3038; FREDDIE MAC; MORTGAGE  
ELECTRONIC REGISTRATION  
SYSTEM, AKA "MERS"; and DOES 1  
through 100, Inclusive,

Defendants.

Case No. 3:16-cv-00576-MMD-VPC

ORDER

**I. SUMMARY**

Before the Court is Plaintiffs' Ex Parte Motion for Temporary Restraining Order ("TRO") (ECF No. 6) ("Motion"). The Motion seeks to halt a trustee's sale scheduled for October 21, 2016, at 9 a.m. (*Id.*) The Court denied Plaintiffs' request for ex parte relief, directed service on Defendants and directed an expedited response from Defendants. (ECF No. 7.) However, Defendants did not file a response within the shortened time frame provided by the Court. After careful review of the Complaint (ECF No.1) and the Motion, the Motion is granted.

**II. BACKGROUND**

The following facts are taken primarily from the Complaint and the Motion. On or about August 12, 2005, Plaintiffs entered into a consumer credit transaction with Soma

1 Financial ("SOMA") by obtaining a \$258,000 mortgage loan ("Loan"). Plaintiffs  
2 provided a promissory note (the "Note") and a Deed of Trust ("DOT") to their principal  
3 residence at 2265 Silky Sullivan Lane, Reno, Nevada 89502 ("the Property") to secure  
4 the Loan. Plaintiffs subsequently defaulted on the Loan and Defendants initiated non-  
5 judicial foreclosure proceedings. Plaintiffs allege that the Note and DOT were not properly  
6 securitized, nor were they properly assigned or transferred to Defendants. (ECF No. 1 at  
7 5-6.) Thus, because Defendants lack proof to perfect chain of title, Plaintiffs allege that  
8 Defendants lack standing to foreclose on the Property.

### 9 **III. LEGAL STANDARD**

10 Federal Rule of Civil Procedure 65 governs preliminary injunctions and temporary  
11 restraining orders, and requires that a motion for a temporary restraining order include  
12 "specific facts in an affidavit or a verified complaint [that] clearly show that immediate and  
13 irreparable injury, loss, or damage will result to the movant before the adverse party can  
14 be heard in opposition," as well as written certification from the movant's attorney stating  
15 "any efforts made to give notice and the reasons why it should not be required." Fed. R.  
16 Civ. P. 65(b).

17 Temporary restraining orders are governed by the same standards applicable to  
18 preliminary injunctions. *Cal. Indep. Sys. Operator Corp. v. Reliant Energy Servs., Inc.*,  
19 181 F. Supp. 2d 1111, 1126 (E.D. Cal. 2001). Furthermore, a temporary restraining order  
20 "should be restricted to serving [its] underlying purpose of preserving the status quo and  
21 preventing irreparable harm just so long as is necessary to hold a hearing, and no longer."  
22 *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70*, 415  
23 U.S. 423, 439 (1974).

24 A preliminary injunction may be issued if a plaintiff establishes: (1) likelihood of  
25 success on the merits; (2) likelihood of irreparable harm in the absence of preliminary  
26 relief; (3) that the balance of equities tips in his favor; and (4) that an injunction is in the  
27 public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). "Injunctive  
28 relief [is] an extraordinary remedy that may only be awarded upon a clear showing that

the plaintiff is entitled to such relief.” *Id.* at 22. The Ninth Circuit has held that “serious questions going to the merits’ and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter* test are also met.” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132 (9th Cir. 2011).

#### IV. DISCUSSION

The Complaint asserts seven claims for violation of NRS § 107.028,<sup>1</sup> injunctive relief pursuant to NRS § 107.080, declaratory relief, quiet title, slander of title, intentional infliction of emotional distress, and lack of standing/wrongful foreclosure. (ECF No. 1 at 13-27.) The Motion appears to be based on Plaintiffs’ claim of wrongful foreclosure. (ECF No. 6.) Plaintiffs request both that the Court issue a TRO preventing the trustee’s sale of the Property currently scheduled for October 21, 2016, as well as *any* trustee’s sale of the Property. (ECF No. 6 at 1, 4 (emphasis in the original).) The Motion alleges irreparable harm from the sale of Plaintiffs’ home and incorporates “the Points and Authorities” of the Motion along with the exhibits attached to the Motion. (*Id.* at 1.) The gist of Plaintiffs’ argument as to the likelihood of success on the merits of the wrongful foreclosure claim is that Defendants have not produced adequate assignments of the Note and DOT in order to have the standing to issue a notice of default and notice of trustee’s sale on the Property. (*Id.* at 2-3.)

The procedures for conducting a trustee’s foreclosure sale are set forth in NRS § 107.080. To commence a foreclosure, the beneficiary, the successor in interest of the beneficiary, or the trustee must execute and record a notice of default and election to sell. NRS § 107.080(2)(c). A copy of the notice of default and election to sell must be mailed by registered mail or certified mail with return receipt requested to “the grantor or, to the

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<sup>1</sup>The section of the Complaint is entitled “NRS 107.028(7)” but the contents of the cause of action include allegations of violations of NRS §§ 107.071, 107.085, 107.500, 107.510, and 107.540. (ECF No. 1 at 14.) Furthermore, there are references to unidentified Defendants in this section of the Complaint (e.g., WFNA, WFHM, HSBC and Quality). (*Id.*)

1 person who holds the title of record on the date the notice of default and election to sell  
2 is recorded, and, if the property is operated as a facility licensed under chapter 449 of  
3 NRS, to the State Board of Health, at their respective addresses, if known, otherwise to  
4 the address of the trust property. NRS § 107.080(3). The trustee or other person  
5 authorized to make the sale must wait at least three months after recording the notice of  
6 default and election to sell before the sale may proceed. NRS § 107.080(2)(e). After the  
7 three-month period, the trustee must give notice of the time and place of the sale to the  
8 following: “each trustor, any other person entitled to notice pursuant to this section and, if  
9 the property is operated as a facility licensed under chapter 449 of NRS, the State Board  
10 of Health, by personal service or by mailing the notice by registered or certified mail to  
11 the last known address of the trustor and any other person entitled to such notice pursuant  
12 to this section.” NRS § 107.080(4)(a).

13 Plaintiffs allege that after they received a second Notice of Default, a hearing was  
14 held in April 2015 before the State of Nevada Foreclosure Mediator. (*Id.* at 2.) At that  
15 hearing, the Mediator found that “although the Note and [Deed of Trust] both ended up  
16 with PNC Bank, the beneficiary, there was a missing assignment of the [Deed of Trust]  
17 from SOMA to [National] City Mortgage in the chain of title.” (ECF No. 1-2 at 3.) The  
18 Mediator also found that the required certifications with an original signature for each  
19 endorsement of the Note were missing. (*See id.*) As a result of the mediation proceeding,  
20 a Certificate of Foreclosure was denied. The Nevada state court affirmed the Mediator’s  
21 findings. (ECF No. 6 at 2.) Defendants nevertheless proceeded with foreclosure by  
22 recording another Notice of Trustee’s Sale, scheduling the sale for October 21, 2016.  
23 (ECF No. 6-2.)

24 Accepting the facts as alleged in the Complaint and the Motion, which is bolstered  
25 by the accompanying exhibits, Plaintiffs have demonstrated that “serious questions going  
26 to the merits” of their wrongful foreclosure claim exist. According to Plaintiffs, the missing  
27 assignment of the DOT creates a defect in the chain of title and prevents the Defendants  
28 from obtaining an FMP certificate. Under Nevada law, for a valid non-judicial foreclosure

1 sale to occur, a Foreclosure Mediation Program (FMP) certificate must be issued.  
2 *Edelstein v. Bank of N.Y. Mellon*, 128 Nev. Adv. Op. 48, 286 P.3d 249 (2012).  
3 Furthermore, because the irreparable harm of losing one's home cannot be easily  
4 remedied while a trustee's sale can be rescheduled for another date, the balance of  
5 equities tips strongly in Plaintiffs' favor. The Court will temporarily enjoin the trustee's sale  
6 noticed for October 21, 2016.

7 **V. CONCLUSION**

8 It is therefore ordered that Plaintiffs' motion for temporary restraining order (ECF  
9 No. 6) is granted. Defendants are temporarily enjoined from proceeding with the October  
10 21, 2016, foreclosure sale pending a hearing. The Court will issue a separate minute  
11 order scheduling the hearing for no later than fourteen (14) days from the date of this  
12 Order and to give Defendants additional time to respond.

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14 DATED THIS 20<sup>th</sup> day of October 2016.

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17 MIRANDA M. DU  
18 UNITED STATES DISTRICT JUDGE  
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